

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

CLEON BROWN,
Plaintiff

Case No. 17-cv-00331
Hon. Janet T. Neff

v.

CITY OF HASTINGS, et al
Defendants

**PLAINTIFF'S RESPONSE TO DEFENDANTS'
SECOND RENEWED PRE-MOTION CONFERENCE REQUEST**

Defendants argue Counts I and II must fail as plaintiff's allegations do not demonstrate he is substantially limited in a major life activity. Defendants cite *Nelly v. Benchmark Family Services*, 640 F. App'x 429 (6th Cir. 2016) in support of their position. *Nelly* is distinguishable in that the plaintiff had not been diagnosed with a disease associated with sleep disturbances. In this case, plaintiff has been diagnosed with a disease (gastroesophageal reflux disease, "GERD" and Barrett's esophagus, which is a complication of GERD)(ECF No. 30, ¶¶ 80-81) and sleeping upright at home is the accommodation (Id. ¶¶ 82-83, 100, 115), not the alleged disability.

Defendants argue Count III must fail as the DNA test the plaintiff used is not within the "scope of protection intended by GINA". In the employment context, GINA has two prohibitive components: prohibition against discrimination based on genetic information (42 USCS §2000ff-1(a)) and prohibition against gathering of genetic information with respect to employees (42 USCS §2000ff-1(b)).

1 GINA prohibits employment discrimination based on genetic information.
2 The statutory definition of “genetic information” includes “an individual’s genetic
3 tests”. 42 USCS §2000ff(4)(A). A “genetic test” is defined as “an analysis of human
4 DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes,
5 mutations, or chromosomal changes”. 42 USCS §2000ff(7)(A). Genotype is the
6 genetic makeup of a cell, the inherited map carried within one’s genetic code.
7 Genotype determines certain characteristics, such as the petal color in a pea plant.
8 Observable outward characteristic determined by genotypes are called phenotypes.
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10 In this case, Defendants demoted and discriminated against plaintiff because
11 of genetic information uncovered as a result of a DNA analysis (Id. ¶¶127-128). One
12 of the things Defendants apparently found especially funny is the fact that Plaintiff
13 has the outward appearance of a Caucasian (phenotype) but the genetic mapping of
14 someone who is 18-33% Sub-Saharan African (genotype). Even in their pre-motion
15 conference requests, Defendants repeatedly argue: “Plaintiff has always held himself
16 out to be white and defendants have always assumed him to be white” (ECF 33, p.2).
17 Indeed, it is the assumption that was dispelled by DNA analysis that, in part,
18 prompted Defendants’ actionable conduct alleged in the pleadings. In other words,
19 everything was fine at work until Defendants discovered Plaintiff was not “pure”
20 white. Defendants are also liable under GINA for failing to train and implement
21 policies and procedures to protect against GINA violations (Id. ¶129)
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1 Defendants argue Counts IV and V must fail because plaintiff is not a member
 2 of a protected class. Title VII's prohibition of race-based discrimination protects
 3 white employees as well as minority employees. **McDonald v. Santa Fe Trail**
 4 **Transp. Co.**, 427 U.S. 273 (1976). In this case, the plaintiff was targeted because his
 5 race/national origin is 82-67% European (i.e., "white") and 18-33% Sub-Saharan
 6 African (ECF 30, ¶ 3) and because he opposed practices and filed with the EEOC.
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 9 Defendants argue Count VI must fail because, other than the demotion, none
 10 of the allegations allege an adverse employment action. Demotion is an adverse
 11 employment action, so are suspensions without pay (Id. ¶ 77bb). Adverse actions
 12 include stripping a police officer's discretionary authority while on patrol, which also
 13 has happened to plaintiff. Finally, Plaintiff was suspended a third time, without cause
 14 and without due process. However, upon information and belief, the City's new City
 15 Mayor found out about the suspension and ordered Plaintiff returned to duty with
 16 full back pay and Defendant Pratt suspended for two weeks without pay.
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 19 Defendants argue Count VII must fail because they fail to make out a claim
 20 for extreme or outrageous conduct. In this case, it is a question of fact for the jury.
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 23 Respectfully submitted,

24 /s/ Karie H. Boylan

25 **BOYLANLAW, P.C.**

26 By: Karie H. Boylan (P55468)

27 410 W. University, Suite 201

28 Rochester, Michigan 48307

Phone: (855) 926-9526

E-Mail: karie@boylanlaw.net

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